

Public Concern at Work

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Public Concern at Work's response to the Central Bank of Ireland's Consultation Paper 79:2014: Handling of Protected Disclosures by the Central Bank of Ireland

Introduction

1. We welcome the opportunity to contribute to this consultation, with the increased focus on whistleblowing in Ireland as a result of recent legislative change and the incoming Protected Disclosures Bill, which will offer statutory protection for all whistleblowers in Ireland for the first time. Our submission will focus on the proposed policies and procedures the Bank are seeking to set up in response to the Central Bank (Supervision and Enforcement) Act.

About Public Concern at Work

2. Public Concern at Work is an independent charity and legal advice centre¹ in the UK. The cornerstone of the charity's work is a confidential advice line for workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. The advice line has advised over 17,000 whistleblowers to date and in turn this has informed our approach to policy and campaigns for legal reform. The Central Bank of Ireland has been a subscriber to our Business Support services since 2008 and as such we have provided the Bank and its staff with whistleblowing support and guidance on this issue for some time.

3. In 2012 and 2013 we campaigned for improvements to the Public Interest Disclosure Act (PIDA), the law that provides a remedy for whistleblowers who have been victimised or dismissed in the UK. Some of our campaign points led to legislative improvements to PIDA in the UK, through the Enterprise and Regulatory Reform Act 2013. However PIDA, while essential legislative protection, is only one part of the whistleblowing framework in the UK that is needed to ensure whistleblowing is safe and effective. To this end in 2012/2013 PCaW established the Whistleblowing Commission to examine the effectiveness of whistleblowing in the UK and to make recommendations for change. The Commission was formed of the following members:

- The Right Honourable Sir Anthony Hooper (Former Court of Appeal Judge and Member of Matrix Chambers (Chair))
- Gary Walker (Former NHS Chief Executive and whistleblower)
- Michael Woodford (Former Olympus President & CEO and whistleblower)
- Lord Burns (Chairman of Santander UK and Channel 4)
- The Very Revd Dr David Ison (Dean of St Paul's Cathedral)

¹ PCaW is regulated by the Charity Commission and the Solicitors' Regulation Authority

- John Longworth (Director General British Chambers of Commerce)
- Michael Rubenstein (Independent legal publisher and discrimination law expert)
- Sarah Veale (Head of Equality and Employment Rights at the Trades Union Congress)

4. The Whistleblowing Commission considered evidence from several pieces of research including a public consultation to which there were 142 responses, a YouGov survey² of public attitudes to whistleblowing and a survey of business practice with EY.³ Additionally an analysis of 1,000 cases from the PCaW advice line contained in the report “Whistleblowing: the inside story”.⁴

5. The Whistleblowing Commission published their report in November 2013. The key recommendation of the Commission is the creation of a statutory Code of Practice which can be taken into account by courts and tribunals considering whistleblowing issues. The report of the Whistleblowing Commission can be found at Annex A and an extract containing the Code of Practice at Annex B. The Commission also recommended that this Code could be used by regulators as part of their inspection and assessment regimes.

The Wider Context of Whistleblowing

6. We note that the process outlined in the consultation document deals specifically with the receipt of protected disclosures by the Central Bank. Experience has shown that regulators should lead by example and have good whistleblowing arrangements in place for their own staff and provide guidance within the sector on good practice whistleblowing arrangements. We would invite the Central Bank to consider the Code of Practice produced by the Whistleblowing Commission (set out at Annex B) and mentioned above for its own arrangements. Additionally, the Central Bank should aim to publish statistics about the use of their arrangements this will increase transparency and could be a means of promotion of the Bank’s reporting procedure.

7. In our experience where whistleblowing and a culture of raising concerns is embedded within a sector, organisations are encouraged to actively whistleblowing both internally and to regulators such as the Central Bank which therefore act as a safety net where individuals feel unable to raise their concern with their employer. We recommend that the Central Bank also issues guidance on whistleblowing arrangements for financial service organisations in Ireland. Shortly after the introduction of the UK whistleblowing legislation in 1998, the Financial Services Authority (the predecessor of the Financial Conduct Authority) produced guidance for organisations. Moreover the importance of producing such guidance should not be underestimated in that it will send a strong message to regulated organisations that they need to encourage the raising of concerns and for all regulated organisations to handle and investigate concerns effectively.

8. The track record of how regulators deal with whistleblowing in the UK is mixed, with some regulators such as the Civil Aviation Authority and the former Audit Commission including an assessment of

² PCaW commissioned a YouGuv Survey on public attitudes towards whistleblowing, <http://www.pcaw.org.uk/whistleblowing-commission-sources-yougov-survey>, published June 2013

³ PCaW and EY business survey of whistleblowing arrangements, <http://www.pcaw.org.uk/whistleblowing-commission-sources-business-survey>, published November 2013

⁴ The report examined the experiences of 1,000 whistleblowers. PCaW, “Whistleblowing: the inside story”, <http://www.pcaw.org.uk/cms/sitecontent/view/id/127/highlight/greenwich>, published May 2013

whistleblowing arrangements as part of their inspection regimes whilst others such as the Care Quality Commission are currently consulting on their inspection priorities. In the UK, the Parliamentary Commission on Banking Standards has recommended that the Financial Conduct Authority takes into account an assessment of whistleblowing arrangements in their inspection and supervisory roles. The Financial Conduct Authority is expected to carry out a consultation on this. The Whistleblowing Commission has also recommended that regulators assess whistleblowing arrangements of organisations within their sectors as part of their inspection regimes. We recommend that whistleblowing is included in the Central Bank's inspection and supervisory regime.

9. The approach of the Central Bank, in seeking views on the proposed procedures to whistleblowing, will provide supervisory authorities with an excellent tool in assessing how open and transparent an organisation's culture is.

10. Inspectors should include analysis of an organisation's whistleblowing arrangements or its equivalent in the inspection processes. As a means of assisting inspectors in this process we recommend they be prompted to compare the organisation's arrangements against the Whistleblowing Commission's Code of Practice (the Code) accounting for the organisation's service users, staff, services delivered and size. The Code builds on existing principles of best practice established by the Committee on Standards in Public Life (CSPL) and the BSI Code of Practice, by detailing how an organisation should seek to encourage and protect workers who come forward with concerns.⁵ Organisations should also be encouraged to use the Code as guide in determining their arrangements.

11. At present many organisations have different policies and processes. It will benefit both individuals and the regulated organisations if there is a consistent and encouraging approach. Likewise that organisations are reporting on the same key factors will enable them to measure progress and performance.

12. We recommend that every sector's guidance includes the following prompt for whistleblowing-
"Whistleblowing arrangements that conform to the Whistleblowing Code of Practice."

13. Whistleblowing arrangements are more than just about a written document, it is also about how the process works in practice and whether staff feel confident to raise concerns within their workplace. Openness and transparency about how a whistleblowing concern is dealt with is an important feature when assessing whistleblowing arrangements. PCaW research into whistleblowing within the financial services sector has revealed poor attitudes towards whistleblowers within the industry and individuals face real challenges in speaking up. More than three quarters (77%) of whistleblowers are ignored when they first raise a concern and 42% of whistleblowers were dismissed after raising their concern for the first time. Of particular interest to the Central Bank will be that workers in this sector are more likely to go to a regulator in the first instance to raise their concern internally.⁶ As such, the new processes signal an opportunity for the regulator to set the tone and encourage financial institutions to take whistleblowing seriously.

⁵ See Annex A for an extract of the Whistleblowing Code of Practice

⁶ PCaW and Slater Gordon report on the experiences of whistleblowers working in financial services, "Silence in the City, <http://www.pcaw.org.uk/silence-in-the-city-whistleblowing-in-financial-services>. Published May 2013.

14. We recommend the following characteristics be used when assessing the adequacy of a financial service provider's whistleblowing arrangements in practice-

- Organisations should have a whistleblowing policy or equivalent that conforms to the standards laid out in the Whistleblowing Code of Practice and it is up to date.
- Organisations should periodically conduct an information campaign to ensure all workers are aware of the whistleblowing policy, encourage workers to report concerns, provide a range of internal and external options for reporting concerns and collect feedback on the policy from all workers.
- Organisations should maintain confidentiality where requested, proactively provide feedback and publicise results of investigations as far as possible.
- Organisations should provide specific training for encouraging, listening and responding to concerns effectively.
- Organisations should periodically review whistleblowing arrangements at board or audit committee level. This review should have the features present in the Code-

- “a. a record of the number and types of concerns raised and the outcomes of investigations;
- b. feedback from individuals who have used the arrangements;
- c. any complaints of victimisation;
- d. any complaints of failures to maintain confidentiality;
- e. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety;
- f. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
- g. a review of any relevant litigation; and
- h. a review of staff awareness, trust and confidence in the arrangements.”⁷

The Central Bank process

15. From our experience providing advice to whistleblowers across all sectors, there should be clear guidance for individuals. We recommend that such guidance includes an explanation of what whistleblowing is, the difference and the limits of anonymity and confidentiality, how the process works and where individuals can get independent advice.

Feedback to the whistleblower

16. We note the Central Bank propose not to provide feedback to whistleblowers for a number of reasons and that the consultation document refers to a similar approach adopted by the FCA. In fact the FCA is in the process of revising their current stance in relation to providing feedback to whistleblowers. The FCA has recognised the importance of feedback as vital to ensuring there is confidence in the process. In our experience, when adequate feedback is not provided to the whistleblower, this can result in the appearance that nothing is done which may cause the individual to escalate their concern unnecessarily, or

⁷ The Whistleblowing Commission Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK, page 28 - 29, published November 2013

can serve as a deterrent as whistleblowers feel reporting a concern is a futile exercise. We appreciate there will be limitations to feedback, for instance where this could impact the confidentiality owed to a third party or where feedback is prevented by legislation, but managing an individual's expectations at the outset on these limitations can do much to address this.

The Protected Disclosures Bill

17. The consultation paper does not mention the Protected Disclosures Bill, due to become Irish law in the relatively near future, which provides protection for individuals who raise concerns about risk, wrongdoing or malpractice in the public interest. The Act will make it easier for workers to raise concerns internally and as such, the Central Bank should consider this when establishing its new procedures as the two pieces of legislation (the Central Bank (Supervision and Enforcement) Act and the soon to be enacted Protected Disclosures Bill) operate differently. The Central Bank (Supervision and Enforcement) Act for instance, places positive duties on those with Pre-Approval Controlled Functions (PCFs) to report breaches of financial services laws to the Bank which means there will be an obligation to report externally, in the first instances in some cases. The Bill however offers greater protection for individuals raising concerns internally with different tests if disclosing to a regulator or wider. The Central Bank will need to consider whether the new procedures will work effectively across both regimes.

18. We note the dedicated email and postal addresses for PCFs who wish to make a disclosures but the Bank will need to have particular regard to confidentiality in receiving concerns. Again there is divergence between the two processes as the Central Bank (Supervision and Enforcement) Act requires PCFs to put their name to any disclosure and to put their concern in writing whereas it is possible to raise concerns confidentially and anonymously under the Bill. The Central Bank Whistleblower Desk will therefore need to be aware of this and handle cases according to the relevant process in each case. This may include explaining that the assurances around confidentiality cannot apply to PCFs who contact them.

19. Further to this is the role of the Central Bank in cases where individuals have been victimised after making disclosures to them. There are various remedies and rights of action an employee can take under each system, including prosecution. It is not clear from the consultation document what role the Bank may play in cases of individuals who are seeking to take action for victimisation resulting from having made disclosures to the regulator. We recommend this is considered by the Bank.

Conclusion

20. In summary, PCaW makes the following recommendations:

- The Whistleblowing Code of Practice should form the basis for assessment of a regulated organisation's whistleblowing policy, or equivalent.
- The Central Bank issue guidance on whistleblowing arrangements for financial service organisations in Ireland
- The Bank reassesses the proposed approach to providing feedback.
- The Bank considers the incoming Protected Disclosures Bill and the interplay between this and the Central Bank (Supervision and Enforcement) Act when establishing the new processes.

We do hope this short submission is helpful and would be pleased to discuss the content further should this be of assistance.

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